

Manfredonia v Weiss
2005 NY Slip Op 30539(U)
December 15, 2005
Supreme Court, New York County
Docket Number: 103498/05
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 5**

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ÉDWARD MANFREDONIA,

Index No. 103498/05

Plaintiff,

Decision and Order

- against -

GARY WEISS, THE MCGRAW-HILL COMPANIES,
INC., ROBERT PRITCHARD, HAROLD MCGRAW III,
STEPHEN SHEPARD and THE CITY OF NEW YORK

Defendants.

FILED
JAN 04 2006
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. MICHAEL D. STALLMAN, J.:

Defendants Gary Weiss, The McGraw-Hill Companies, Inc., Robert Pritchard, Harold McGraw III, and Stephen Shepard (the McGraw-Hill defendants) move for summary judgment dismissing the complaint.¹

This is a defamation action by plaintiff Edward Manfredonia, who is appearing pro se, relating to a series of articles written by Gary Weiss, a former writer for Business Week, published by McGraw-Hill.

It is essentially undisputed that Manfredonia considered himself, and was considered by Weiss, to be a whistleblower concerning various practices at the American Stock Exchange. Weiss met with Manfredonia and talked with him on numerous occasions in or about 1998 and 1999, and carried out investigations concerning Stock Exchange practices, at least in part, as a result of his discussions with Manfredonia. As a result of his discussions and investigations, Weiss wrote a 12-page cover story that appeared in BusinessWeek on April 28, 1999, entitled "The American Stock

¹ The McGraw-Hill defendants originally filed their motion as a motion to dismiss, but this Court ordered that the motion be converted to summary judgment and afforded the parties an opportunity to submit further papers.

Exchange Scandal on Wall Street." That story described serious problems on Wall Street, ranging from price-fixing, to allegedly improper activities by Stock Exchange officials and specialists. Manfredonia has characterized the April 1999 article as having saved his life.

Later in 1999, Weiss wrote another story published in BusinessWeek on December 20, 1999 entitled, "A Message from the Mob?" which concerned the murder of a stock promoter, Albert Alain Chalem, and his business associate, Maier Lehmann. That article led to what Manfredonia describes in numerous letters as "a rift" between himself and Weiss. According to Manfredonia, Weiss "lied" in the Mob article, by incorrectly attributing the killings to the Italian Mafia, when he knew that the Russian Mafia was responsible. Manfredonia alleges that by attributing the deaths to the Italian Mafia, Weiss and the McGraw-Hill defendants smeared the good name of Italian Americans and that defendants libeled him, in part, because he is Italian American.

In or about the fall of 2000, a trade publication for investigative journalism, the IRE Journal, published an article by Weiss titled "Offering Credence to the Crank," in its September/October 2000 edition. In that article, Weiss discussed the problem of writing stories about powerful institutions and the fact that reporters often disregard the disgruntled former employees or former customers who offer information about improper practices. Noting that such people are often "cranks," Weiss stressed the importance of listening to such sources, specifically mentioning Manfredonia, describing him as a "rara avis [rare bird] - a bona-fide whistleblower" (Offering Credence to the Crank, IRE Journal, at 20), and noted that information from Manfredonia resulted in his 12-page BusinessWeek cover story which appeared in the April 28, 1999 issue. Weiss stated, however, that "Manfredonia was not a source for the price-fixing or specialist parts of my story." While explaining why reporters and editors often turn away information from such sources, Weiss wrote of the valuable information

those sources may have, and the importance of giving them credence.

In a very lengthy and repetitious complaint, plaintiff essentially alleges that Weiss defamed him by describing him in the IRE Journal article as: a "crank" who "is unconventional, difficult and may give the appearance of being off-balance" (Verified Complaint, ¶ 35); someone "who wear[s] baseball caps" (*id.* ¶ 94); and someone who "hang[s] out in front of stock exchanges" (*id.*, ¶ 45); and by stating that "even more off-putting was his opaque writing and overuse of trading jargon that I found almost impossible to decipher." (*id.*, ¶ 30). Finally, Manfredonia contends that Weiss defamed him by stating that he was not a source for the price-fixing or specialist parts of the story. Plaintiff further alleges that Weiss's statement, "Not every source resembles Russell Crowe[, s]ometimes they hang out in front of the stock exchange," was written "in a libelous manner." *Id.*, ¶ 45.

Manfredonia's primary complaint regarding the IRE Journal article, however, concerns Weiss's statement that Manfredonia was not a source for the price-fixing aspects of Weiss's BusinessWeek article. Manfredonia contends that Weiss's statement was a lie and was defamatory, and that Weiss made the statement because he planned to write a book about Wall Street and knew that Manfredonia also planned to write a book about the same subject.

According to Manfredonia, he first learned of Weiss's alleged libels in Offering Credence to the Crank, on April 12, 2004, as a result of an internet search of "Edward Manfredonia" using the Google search engine. In August 2004, Manfredonia wrote to defendant Harold McGraw, Chairman of McGraw-Hill, and Kenneth Vittor, Executive Vice President of Legal Affairs of McGraw-Hill, alleging that Weiss had lied in his articles, A Message From The Mob and Offering Credence To The Crank, and demanding that Weiss be fired. In both letters, Manfredonia stated that he spoke to "your secretary" and "informed her that she must state to you that Gary Weiss had been forced to resign

that Weiss was terminated for lying in two stories." Verified Complaint, Exhs 7 & 8.

These were not Manfredonia's first letters complaining about Weiss. Beginning in 2000 and during the next four years, Manfredonia wrote numerous letters to Vittor, defendant McGraw, defendant Stephen Shepard, Editor in Chief of McGraw-Hill, several members of the McGraw-Hill Board of Directors, several BusinessWeek staff members, and Morton Janklow, Weiss's literary agent, alleging, inter alia, that Weiss "lied" in his "Message From the Mob" story. As early as November 21, 2000, Vittor had responded to Manfredonia's letters to Vittor and Shepard, stating that "McGraw-Hill Companies and BusinessWeek vigorously deny your unsubstantiated allegations against Messrs. Shepard and Gary Weiss concerning purported cover-ups, misconduct and lies." Letter from Kenneth M. Vittor to Edward Manfredonia, dated November 21, 2000. Vittor stated that McGraw-Hill would not respond to further communications from Manfredonia.

In October 2004, Manfredonia wrote to Professor Brant Houston, Executive Director of the Journal of Investigative Reporters and Editors (The IRE Journal) of the University of Missouri School of Journalism, criticizing Weiss, particularly Weiss's statement that Manfredonia had not been the source for his information concerning price-fixing, and alleging that Weiss was a liar.

On September 25, 2004, Manfredonia called Weiss on his cell phone and left a message repeatedly claiming that Weiss had lied in his articles, that Weiss had damaged Manfredonia's reputation, that Weiss's own reputation was ruined, that Manfredonia was going to be "relentless" at "exposing what happened at BusinessWeek," that Weiss was "dead meat," and that Weiss had covered up rape and murder. Transcript of voice mail message left September 25, 2004, Exh. D to Affidavit of Gary Weiss In Support Of The McGraw-Hill Defendants' Motion To Dismiss The Complaint. After Weiss, who was no longer on the staff of BusinessWeek, received the phone call,

he contacted McGraw-Hill, and with the assistance of McGraw-Hill, on October 6, 2004, Weiss filed a complaint against Manfredonia for aggravated harassment at the Midtown North precinct of the New York City Police Department.

On December 1, 2004, Manfredonia called Weiss's home telephone and left a message on his answering machine, again complaining that Weiss had lied about the deaths of Chalem and Lehmann, and about whether Manfredonia had been his source, and threatening to sue Weiss.

Weiss again contacted McGraw-Hill concerning what he interpreted as escalating harassment. As a result, on January 27, 2005, Robert Pritchard, Vice-President of Global Corporate Security for McGraw-Hill, sent a "cease and desist" letter to Manfredonia, directing him to cease attempting to communicate with Weiss. In that letter, Pritchard described the unsolicited messages left by Manfredonia on Weiss's home and cell phones, as well as the many letters concerning Weiss sent by Manfredonia to numerous persons, including the Securities and Exchange Commission and other governmental and judicial entities, McGraw-Hill officials and employees, including the chairman and CEO, the general counsel and members of the board of directors, and former colleagues of Weiss, Weiss's literary agent, Columbia University, and the IRE Journal at the University of Missouri School of Journalism. Pritchard mentioned that a complaint for aggravated harassment had been filed with the New York City Police Department, and that further attempts to contact or communicate with Weiss, or to contact third parties concerning Weiss, with libelous or threatening information "may be considered a violation of applicable civil and criminal laws, including New York state criminal laws which prohibit stalking, harassment and criminal nuisance." Letter from Robert Pritchard to Edward Manfredonia, dated January 27, 2005.

Manfredonia alleges that the Pritchard letter is false and libelous, and further alleges, on information and belief, that the McGraw-Hill defendants distributed copies of that letter to various individuals, including the faculty of the University of Missouri and staff and employees of McGraw-Hill. Verified Complaint, ¶ 244.

The McGraw-Hill defendants move for an order granting summary judgment dismissing the complaint against them.

The McGraw-Hill defendants first argue that the claims based upon Weiss's articles, that were published in 1999 and 2000, are all time-barred. The statute of limitations for defamation actions is one year from the time of publication. CPLR 215 (3). New York has adopted the single publication rule, that

"the publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of thousands of copies widely distributed, is, in legal effect, one publication which gives rise to one cause of action and that the applicable [s]tatute of [l]imitation[s] runs from the date of that publication."

Firth v State of New York, 98 NY2d 365, 369 (2002), quoting *Gregoire v G.P. Putnam's Sons*, 298 NY 119, 123 (1948). That rule has not been altered by the advent of the internet. According to the Court of Appeals, communications over the internet resemble communications in traditional media, though on a grander scale. Therefore, it is even more important to maintain the single publication rule.

Republication of a defamatory statement, that is, a separate aggregate publication on a different occasion, which is not merely a delayed circulation of the original publication, would re-trigger the statute of limitations. *Drakes v Rulon*, 6 Misc 3d 1025A (Sup Ct, Kings County 2005). Thus, publication of a paper copy of the IRE Journal and an on-line publication could constitute

separate publications, if published at different times. Weiss states under oath that he saw the IRE Journal's on-line web edition of "Offering Credence to the Crank" during the year 2000. Thus, even assuming that the website version of the article was published later in the year 2000 than the paper journal, the statute of limitations on the website version would also begin to run in 2000.

Manfredonia's statement that he finds Weiss's assertion that he saw a copy of the on-line IRE Journal article in the year 2000 "implausible" is insufficient to overcome Weiss's sworn statement. *See* Plaintiff's Supplemental Affidavit In Opposition To Summary Judgment, ¶ 7. Manfredonia contends that, had the IRE Journal article been publicly available on-line in the year 2000, when Weiss states that he saw it, it would have been readily available in a Google search of "Edward Manfredonia" at that time. However, Manfredonia does not state that he made such a search in the year 2000, nor does the fact that Google might not have located the article necessarily mean that it was not available. Manfredonia is essentially speculating that the on-line journal was not publicly available in the year 2000, and such speculation is insufficient to overcome Weiss's sworn statement.

The fact that Manfredonia accessed Weiss's article in the year 2004 using an internet search engine does not constitute another "republishing" starting the limitations period anew. Rather, when plaintiff found the article on the internet it was more akin to his finding a magazine or book in a library, years after publication. The Court, therefore, concludes that Manfredonia's first, second, and third causes of action, which relate to the Weiss articles that were published in 1999 and 2000, are time-barred.

Even if those causes of action were not time-barred, however, the Court finds that the statements on which plaintiff bases his complaint are not defamatory as a matter of law.

Defamation is defined as "the making of a false statement which tends to "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society."" *Foster v Churchill*, 87 NY2d 744, 751 (1996), quoting *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 (1977), additional citations omitted. Unless the alleged statements are libelous per se, the plaintiff must allege special damages, which he has not done. Statements that impugn a person's business reputation may be per se defamatory, however, "the challenged statements 'must be more than a general reflection upon [the plaintiff's] character or qualities', and must suggest improper performance of his duties or unprofessional conduct." *Chiavarelli v Williams*, 256 AD2d 111, 113 (1st Dept 1998)(citation omitted). The court must consider whether, taken in context, the words can be readily interpreted as suggesting "fraud, dishonesty, misconduct or unfitness in [his] business" with respect to plaintiff. *Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 261 (1st Dept 1995)(citation omitted).

Whether a particular statement is defamatory initially presents a threshold legal question which must be resolved by the court. *Aronson v Wiersma*, 65 NY2d 592, 593 (1985). In determining whether a statement constitutes defamation, the court must consider whether it "would reasonably appear to state or imply objective fact" or whether it constitutes "opinion" and thus, is not actionable. *Immuno AG v Moor-Jankowski*, 77 NY2d 235, 243, cert denied 500 US 954 (1991). The court must give the words a fair reading, construed in the context of the entire statement, and "consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person." *Id.*

Certainly none of the statements quoted by plaintiff from the article "Offering Credence to the Cranks" constitutes defamation per se. Assuming that Manfredonia's "business" is that of a whistleblower, Weiss has written nothing which suggests that Manfredonia is guilty of fraud, dishonesty or professional misconduct or that he is unfit to be a whistleblower. More important, looking at the entire context of the article, as the court must, rather than describing Manfredonia as unfit to be a whistleblower, Weiss's article, taken as a whole, discusses the value of people like Manfredonia and encourages his colleagues in the press to pay attention to what they say, because they often have valuable information to share. Finally, there is no way that Weiss's statement, that Manfredonia was not his source regarding the price-fixing or specialist parts of his story, could objectively be considered defamatory, much less defamatory per se. Although Manfredonia may wish to be credited as Weiss's source of specific information, saying that he was not that source cannot, objectively, be said to expose him to ridicule aversion or disgrace, particularly in light of the overall tenor of Weiss's article. Nor do the other statements complained of by Manfredonia, implying that Manfredonia wore a baseball cap and hung out in front of the courthouse, meet that definition of defamation. The statements characterizing Manfredonia's prose as opaque and difficult to decipher are statements of opinion, rather than fact, and are protected. The statements characterizing some whistleblowers as cranks and giving the appearance of being unstable do not purport to describe Manfredonia, and even if they did, they constitute opinion, not fact, and are not actionable. Therefore, even if Manfredonia's first three causes of action were timely, they would be dismissed as a matter of law.

Manfredonia's fourth cause of action alleges that Weiss libeled plaintiff when, on October 6, 2005, he filed a criminal complaint for aggravated harassment against Manfredonia with the New

York City Police Department. Manfredonia further alleges that the "cease and desist" letter from defendant Pritchard, dated January 27, 2005, which states that Weiss filed the harassment complaint is false and libelous. Manfredonia alleges, on information and belief, that the McGraw-Hill defendants distributed copies of that letter to various individuals, including the faculty of the University of Missouri and staff and employees of McGraw-Hill. Verified Complaint, ¶ 244.

The criminal complaint made by Weiss to the New York City Police Department stated as follows:

AT T/P/O C/V STATES THAT THE SUBJECT OF THIS INVESTIGATION DEVELOPED A BUSINESS RELATIONSHIP IN 1997. C/V WAS A WRITER FOR BUSINESSWEEK MAGAZINE/McGraw-Hill COMPANY WHEN HE BEGAN TO WRITE NUMEROUS ARTICLES ABOUT THE AMERICAN STOCK EXCHANGE. WHILE WRITING THESE ARTICLES FOR NEWSWEEK [sic] THE SUBJECT GREW ANGRY AT C/V BECAUSE SUBJECT WAS NOT SATISFIED WITH THE ARTICLE AND COMPLAINED TO McGraw-Hill COMPANY BY WRITING LETTER AND MAKING ALIGATIONS [sic] AGAINST C/V, ON 09/24/05 THE SUBJECT CONTACTED C/V WIA [sic] HIS CELL PHONE AND STATED THAT HE WAS VERY ANGRY WITH C/V AND STATED THAT IF I COULD PROVE YOU DEFAMED ME I'M GOING TO SUE YOU, YOUR [sic] DEAD MEAT. C/V FURTHER STATED THAT THIS WAS THE FIRST TIME THAT THE SUBJECT HAS EVER CALLED TO SPEAK TO C/V THROUGH HIS CELL PHONE CAUSING ALARM AND ANNOYANCE TO C/V. DUE TO A RECENT LEGAL CHANGE WITHIN DEPARTMENT GUIDE LINES MO3 WILL NOT ENFORCE PROVISIONS OF PENAL LAW SECTION 240.30(1) WHEN THE COMMUNICATION AT ISSUE IS MERELY INTENDED TO CAUSE ANNOYANCE OR ALARM.

Complaint Report-2004-006-65950.

On the basis of Manfredonia's lengthy correspondence, not only to Weiss, but to McGraw-Hill officials and others, as well as the tape recording and transcript of Manfredonia's voice mail messages, all of which are contained in the record, the Court concludes that the factual statements made by Weiss to the police concerning Manfredonia's conduct are true. Manfredonia appears to argue that Weiss could not have been alarmed by his phone message, because he had called Weiss

on numerous occasions when Weiss was researching the BusinessWeek articles. Manfredonia does not, however, deny that those previous calls were always placed to Weiss's office phone and that he had never before called Weiss's cell phone. As to Weiss's statements to the police that he was alarmed and annoyed by the cell phone call and considered it an escalation of harassment, Weiss has submitted an affidavit to this Court reiterating that he was alarmed by the call. Furthermore, Weiss's statements concern his state of mind, and are not about Manfredonia. In any case, they are more akin to opinion statements, than to factual assertions about Manfredonia; thus, they do not constitute defamation, as a matter of law.

Manfredonia contends that the criminal complaint should not have been filed with the Midtown North precinct, because Weiss lives in the 6th Police Precinct rather than in midtown. Even assuming that Weiss filed his complaint in the wrong precinct, that would not render the statements made to the police defamatory, nor would the fact that the police did not enforce the complaint due to a change in department guidelines.

With respect to the Pritchard letter, the McGraw-Hill defendants contend that the cause of action must be dismissed, because Manfredonia failed to allege publication to a third party, which is necessary for a cause of action for defamation.

In addition to setting forth the particular words complained of, the complaint must allege "the time, place and manner of the false statement and specify to whom it was made." *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999); *see also Kahn v Duane Reade*, 7 AD3d 311 (1st Dept 2004). Although Manfredonia does allege, on information and belief, that defendants distributed the Pritchard letter to numerous persons, including McGraw-Hill staff members and faculty at the University of Missouri, that general assertion does not allege with sufficient particularity to whom

the letter was distributed or the time, place, and manner of publication, to withstand dismissal.

With respect to the content of the Pritchard letter, there too, Pritchard's statement that Manfredonia has sent letters concerning Weiss to the numerous parties mentioned, is accurate. Pritchard's characterization of those letters as libelous is opinion, and does not constitute defamation, as a matter of law. Pritchard's characterization of the unsolicited voice mail messages as threatening is a reasonable, and not false, characterization, and his statement that a criminal complaint for aggravated harassment was filed is also accurate, irrespective of whether the Police Department pursued the complaint. While Manfredonia may contest Pritchard's cease and desist demand, making that demand to Manfredonia does not constitute defamation. Thus, summary judgment is granted dismissing the fourth cause of action.

In his fifth cause of action, Manfredonia seeks injunctive relief preventing defendants from disseminating allegedly defamatory statements about him. Because of the constitutional guarantee of freedom of speech, a plaintiff has a heavy burden to justify prior restraint of speech, particularly where expressions of opinion are involved. *Trojan Elec. & Mach. Co., Inc. v Heusinger*, 162 AD2d 859, 859-860 (3d Dept 1990). Where, as here, plaintiff is seeking to enjoin future defamatory statements, he must, at a minimum, establish a cause of action for defamation in the first place. *Penn Warranty Corp. v DiGiovanni*, ___ Misc3d ___, 2005 WL 2741947 (Sup Ct, NY County 2005). This he has failed to do. Manfredonia's fifth cause of action is, therefore, dismissed.

Manfredonia's sixth cause of action seeks an order requiring the New York City Police Department to produce a copy of the police complaint filed against him as well as copies of all statements made to the police by Weiss and any of the McGraw-Hill defendants. Because that cause of action is not directed to the moving defendants, it will not be addressed here, beyond noting that

Manfredonia is now in possession of a copy of the police report.

In the seventh cause of action, Manfredonia seeks compensatory and punitive damages against Weiss and the McGraw-Hill defendants for filing what he characterizes as a false and malicious complaint against him with the police. Manfredonia alleges that Weiss filed the criminal complaint, with the assistance of the McGraw-Hill defendants, in an attempt to harass him and to cover up what he characterizes as Weiss's lies in his articles *Offering Credence to the Crank and A Message from the Mob*.

To state a claim for malicious prosecution, a plaintiff must establish: "1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; 2) the termination of the proceeding in favor of the accused; 3) the absence of probable cause for the criminal proceeding; and, 4) actual malice." *Kellermueller v Port Auth. of New York and New Jersey*, 201 AD2d 427, 428 (1st Dept 1994). Although plaintiff has established the first and second elements of the cause of action, he has failed to establish the third. A lack of probable cause may not be inferred from the fact that the Police Department chose not to prosecute Weiss's complaint against Manfredonia. *See Web Management LLC v Sphere Drake Ins. Ltd.*, 302 AD2d 273 (1st Dept 2003). Furthermore, this Court has already ruled above that the specific factual statements made by Weiss in his statement to the police were true, and the Court further concludes that, in light of the barrage of correspondence from Manfredonia to and concerning Weiss over the two-year period, Weiss had an objectively reasonable basis for his concern regarding Manfredonia's telephone message, and therefore, for filing the complaint. *Id.*; *see also Shapiro v County of Nassau*, 202 AD2d 358 (1st Dept 1994). The Court need not reach the fourth element of a cause of action for malicious prosecution, and the seventh cause of action is dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants Gary Weiss, The McGraw-Hill Companies, Inc., Robert Pritchard, Harold McGraw III, and Stephen Shepard is granted and the complaint is severed and dismissed as to them, with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in favor those defendants accordingly; and it is further

ORDERED that the remainder of the action shall continue.²

Dated: December 15, 2005
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED
JAN 04 2006
NEW YORK
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² The Court does not opine on the merits, if any, of the remainder of the action as against the City; the City has not moved with respect to the complaint.